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IN THE
COURT OF APPEALS OF INDIANA

ANTOINETTE JENKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0608-CR-681
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No. 34D02-0507-FB-00239

June 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Antoinette Jenkins ("Jenkins") appeals her conviction for Arson as a Class B felony claiming that the trial court erred by allowing the State to amend its charging information and submit evidence in support of its amended information after Jenkins filed a Notice of Alibi Defense and after the commencement of the jury trial. Finding that the defect in the State's charging information was one of form, not substance, that did not prejudice Jenkins' substantial rights, we affirm.

Facts and Procedural History

On *May* 15, 2005, Jenkins entered Lafollette Bogans' leased apartment through an unlocked door and set it on fire by turning on two stove burners and then flicking a lit cigarette "on the pile of clothes and papers on [her] way out." State's Trial Ex. 4, p. 21-23. Later that same day, Lieutenant David Galloway and Investigator Pat O'Neill spoke with Jenkins at her home and then proceeded with her to the Kokomo Police Department, where she made a recorded statement. In her statement, Jenkins admitted that she knew that there was a good chance that throwing a lit cigarette on the papers and clothes was going to start a fire.

The State charged Jenkins with Burglary as a Class B felony[1] and Arson as a Class B felony.[2] The State later dismissed the burglary charge. The charging information for arson alleged that Jenkins started the fire "on or about the 15th day of *June* 2005." Appellant's App. p. 11 (emphasis added). On January 12, 2006, Jenkins filed a Motion

[1] Ind. Code § 35-43-2-1(1)(B)(i).

[2] Ind. Code § 35-43-1-1(a)(1).

for Leave to File a Notice of Alibi Defense that stated, "at the time of the offense she, and others, were at a location other than the location charged in the Information filed herein." *Id*. at 13. On January 27, 2006, Jenkins filed a Notice of Alibi Defense that did not include where she was at the time the crime occurred. After Jenkins filed her Notice of Alibi defense, David Steele ("Prosecutor") contacted David Rosselot ("Jenkins' counsel") in an effort to ascertain what Jenkins' alibi was because it was omitted from her Notice of Alibi Defense. Jenkins' counsel told Prosecutor "you'll notice I file those in each and every case. It's simply a form." Tr. at 21. After speaking with Jenkins' counsel, Prosecutor did not respond to her Notice of Alibi Defense.

At trial, when the State started to present evidence regarding the fire on *May* 15, 2005, Jenkins objected because the State's charging information alleged *June* 15, 2005, as the date of the fire. The trial court denied Jenkins' objection after determining that her Notice of Alibi Defense was deficient because "no substantive alibi defense [was] set forth in [Jenkins'] brief." *Id*. at 28. Due to this deficiency, the trial court determined that the State had no obligation to respond to Jenkins' alibi notice. The trial court then requested that both parties file briefs regarding whether the State could amend its charging information to accurately reflect May 15, 2005, as the date of the commission of the fire. Following briefing, the trial court allowed the State to amend its charging information because "the granting of such motion will not deprive [Jenkins] of any legitimate defense, nor will it prejudice her otherwise." *Id*. After the State concluded its presentation of evidence, the jury found Jenkins guilty of arson. Jenkins now appeals.

Discussion and Decision

Jenkins contends that the trial court erred when it allowed the State to amend its charging information and submit evidence in support of its amended information after commencement of the jury trial. We disagree.

Indiana Code § 35-34-1-5 governs our procedures with regard to the State's ability to amend its charging information.[3] In pertinent part, Ind. Code § 35-34-1-5 states:

> (a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including:
>
> > (1) any miswriting, misspelling, or grammatical error; [or]
> >
> > * * * *
> >
> > (9) any other defect which does not prejudice the substantial rights of the defendant.
>
> (b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:
>
> > (1) thirty (30) days if the defendant is charged with a felony; or
> > (2) fifteen days if the defendant is charged only with one (1) or more misdemeanors; before the omnibus date. When the information or indictment is amended, it shall be signed by the prosecuting attorney.
>
> (c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

With regard to this statute, our Supreme Court recently clarified that a charging information may be amended at various stages of a trial, depending on whether the

[3] We note that the Indiana Legislature amended Indiana Code § 35-34-1-5 with an effective date of May 8, 2007. However, because Jenkins committed her offense before the legislature amended the statute, our review is based on the old statute.

amendment is addressed to an immaterial defect, to a matter of form, or to a matter of substance. *Fajardo v. State*, 859 N.E.2d 1201, 1204-05 (Ind. 2007). Thus, the first step in evaluating whether a charging information can be amended is to determine whether the amendment is addressed to an immaterial defect, to a matter of form, or to a matter of substance. *Id*. at 1204-05. In this case, we will look only to whether the amendment is one of form or substance.[4]

"An amendment is one of form and not substance if a defense under the original information would be equally available after the amendment and the accused's evidence would apply equally to the information in either form." *Id*. at 1205. Subsection 5(c) expressly permits amendments "at any time before, during, or after the trial" but only for amendments "in respect to any defect, imperfection, or omission *in form* which does not prejudice the substantial rights of the defendant." Ind. Code § 35-34-1-5(c) (emphasis added).

Jenkins argues that the State should not have been allowed to amend its charging information and admit evidence regarding the fire that occurred on May 15, 2005, because Prosecutor failed to respond to Jenkins Notice of Alibi Defense and that amending the charging information is a substantive change that materially affected Jenkins availability of a defense and altered the evidence which existed under the original charging information. We cannot agree.

Our first task in determining whether the trial court erred in allowing the State to amend its charging information and admit evidence regarding the fire is to determine

[4] We specifically do not reach the issue of whether this amendment was an amendment of an immaterial defect under Indiana Code § 35-34-1-5(a).

whether the amendment to the charge was one of form or substance. We, therefore, must determine whether Jenkins' alibi defense under the original charging information would be equally available after the amendment and whether her evidence would apply equally to the information in either form.

Jenkins' sole defense at trial was an alibi defense. Indiana Code § 35-36-4-1 sets forth the requirements for an alibi defense. Specifically, Indiana Code § 35-36-4-1 requires a defendant's alibi notice to "include specific information concerning the exact place where the defendant claims to have been on the date stated in the indictment or information." The notice of alibi statute was enacted to serve two main purposes: (1) to protect the defendant's ability to establish the defense by requiring the State to commit to a particular place and time that it intends to prove at trial as being the particulars of the crime; and (2) because the law recognizes that some defendants will fabricate an alibi, the statute allows the State to receive notice before trial regarding the place that the defendant claims to have been at the time of the commission of the crime. *Griffin v. State*, 664 N.E.2d 373, 375 (Ind. Ct. App. 1996). "The alibi statute is not intended to compel the exclusion of evidence or mandate retrials for purely technical errors." *Id*. at 376.

If a defendant's alibi notice comports with Indiana Code § 35-36-4-1, the prosecuting attorney is required to file and serve a response containing: "(1) the date the defendant was alleged to have committed the crime; and (2) the exact place where the defendant was alleged to have committed the crime." *See* Ind. Code §35-36-4-3. If a prosecuting attorney fails to file and serve a response in accordance with the statute and

does not show good cause for his failure to do so, then the court is required to exclude evidence offered by the prosecuting attorney to show: "(1) that the defendant was at a place other than the place stated in the information or indictment; and (2) that the date was other than the date stated in the information or indictment." *Id*. However, strict adherence to the requirements of the notice of alibi statute is a prerequisite to the application of the rights and duties under Indiana Code § 35-36-4-3, requiring the State to file a response. *See Bullock v. State*, 178 Ind. App. 316, 320, 382 N.E.2d 179, 183 (1978).

Jenkins stated in her alibi defense "at the time of the offense she, and others, were at a location other than the location charged in the Information filed herein." Appellant's App. p. 13. Jenkins' description of where she was does not include "specific information concerning the exact place where [she] claims to have been on the date stated in the indictment or information." *See* Ind. Code § 35-36-4-1. When pressed for specifics concerning her alibi defense, Jenkins' counsel told Prosecutor "you'll notice I file those in each and every case. It's simply a form." Trial Tr. p. 21. Thus, the trial court did not err in determining that Jenkins' alibi notice was deficient because it was too general to meet the requirements under Ind. Code § 35-36-4-1. *See Baxter v. State*, 522 N.E.2d 362, 367-68 (Ind. 1988) ("[D]efendant's statement that he was in Pennsylvania was too general to meet the requirements of Ind. Code § 35-36-4-1"), *reh'g denied*; *Graham v. State*, 464 N.E.2d 1, 8 (Ind. 1984) (concluding appellant's statement that he was in Indianapolis at the time of the crime inadequate for notice of alibi); *Ridgeway v. State*, 422 N.E.2d 410, 415 (Ind. Ct. App. 1981) (holding alibi notice defective that merely

stated that defendant was at his home in Kokomo, "among other places"). In other words, Jenkins' alibi defense was never actually available under the original charging information because it was too general to meet the requirements under Indiana Code § 35-36-4-1. Because Jenkins' alibi defense was deficient, the State was not required to file an answer and was allowed to present evidence that the defendant was at a place other than that set forth in the charging information. *See Bullock*, 178 Ind. App. at 320, 382 N.E.2d at 183 ("Strict adherence to the requirements of [I.C. 35-36-4-1] . . . is a prerequisite to the application of the rights and duties established in [I.C. 35-36-4-2], which requires the State to file an answer if requested by the defendant.").[5]

Jenkins claims that the amendment to the charging information was not permissible because the amendment was a change in substance and not form and hence, she argues, that amending the charging information destroyed the viability of her alibi defense. However, because Jenkins' alibi defense under the original charging information was deficient, it was never a viable defense. *See* I.C. § 35-36-4-1. Thus, amending the charging information did not impact the viability of her defense.

Because amending the charging information did not affect a viable defense, the amendment was a matter of form that did not prejudice Jenkins' substantial rights. In that this error was one of form not substance, the State was allowed to amend its charging information "at any time before, during, or after the trial." *See* I.C. § 35-34-1-5(c).

[5] Because Jenkins did not set forth a viable alibi defense, the State was allowed to introduce evidence of the defendant's location on a date other than the date set forth in the original charging information.

Therefore, the trial court did not err in allowing the State to amend its charging information and in admitting evidence regarding the May 15, 2005, fire.

Affirmed.

ROBB, J., concurs.

SULLIVAN, J., concurs in result.